OFFICE OF GOVERNMENT ETHICS AUTHORIZATION ACT OF 1994

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

ON

H.R. 2289

OFFICE OF GOVERNMENT ETHICS AUTHORIZATION ACT OF 1994

MAY 12, 1994

Serial No. 65

Printed for the use of the Committee on the Judiciary

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OFFICE OF GOVERNMENT ETHICS AUTHORIZATION ACT OF 1994

THURSDAY, MAY 12, 1994

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2226, Rayburn House Office Building, Hon. John Bryant (chairman of the subcommittee) presiding.

Present: Representatives John Bryant, George W. Gekas, and Jim Ramstad.

Also present: Paul J. Drolet, counsel; David Naimon, assistant counsel; Nichole L. Jenkins, assistant counsel; and Raymond Smietanka, minority counsel.

OPENING STATEMENT OF CHAIRMAN BRYANT

Mr. BRYANT. Good morning, ladies and gentlemen. The Subcommittee on Administrative Law and Governmental Relations will come to order.

The subcommittee meets today to take testimony on H.R. 2289, the Office of Government Ethics Act of 1994. The bill before the subcommittee would reauthorize the Office of Government Ethics for a period of 8 years and provide the agency with gift acceptance authority.

The Office of Government Ethics was established pursuant to the Ethics in Government Act of 1978. The agency was created to provide overall direction on executive branch policies on conflicts of interest and other ethics issues.

For its first 10 years, it was officially part of the Office of Personnel Management. It became independent on October 1, 1989. Congress reauthorized funding for OGE in 1983 and 1988. Its current appropriation is $8.3 million and President Clinton has requested $8.1 million for the fiscal year that begins October 1. The agency has approximately 90 employees.

OGE has issued a number of regulations since its last reauthorization. Some of the most significant of these regulations are: First, the first comprehensive governmentwide standards of ethical conduct replacing agencies' specific standards and used since the mid-1960's; second, rules on public and confidential financial disclosure; and third, ethics training requirements for Federal employees.

[The bill, H.R. 2289, follows:]

I

103D CONGRESS
1ST SESSION

H. R. 2289

To amend the Ethics in Government Act of 1978 to extend the authorization of appropriations for the Office of Government Ethics for 8 years, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 26, 1993

Mr. CLAY (by request) introduced the following bill; which was referred jointly to the Committees on Post Office and Civil Service and the Judiciary

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A BILL

To amend the Ethics in Government Act of 1978 to extend the authorization of appropriations for the Office of Government Ethics for 8 years, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Office of Government Ethics Authorization Act of 1994".

SEC. 2. GIFT ACCEPTANCE AUTHORITY.

Section 403 of the Ethics in Government Act of 1978 (5 U.S.C. App.) is amended—

(1) by inserting "(a)" before "Upon the request"; and

(2) by adding at the end the following:

"(b)(1) The Director is authorized to accept and utilize, on behalf of the United States, any gift, donation, bequest, or devise of money, use of facilities, personal property, or services for the purpose of aiding or facilitating the work of the Office of Government Ethics.

"(2) No gift may be accepted—

"(A) that attaches conditions inconsistent with applicable laws or regulations; or

"(B) that is conditioned upon or will require the expenditure of appropriated funds that are not available to the Office of Government Ethics.

"(3) The Director shall establish written rules setting forth the criteria to be used in determining whether the acceptance of contributions of money, services, use of facilities, or personal property would reflect unfavorably upon the ability of the Office of Government Ethics or any employee to carry out its responsibilities or official duties in a fair and objective manner, or would compromise the integrity or the appearance of the integrity of its programs or any official involved in those programs.".

SEC. 3. EXTENSION OF AUTHORIZATION OF APPROPRIATIONS.

Section 405 of the Ethics in Government Act of 1978 (5 U.S.C. App.) is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"There are authorized to be appropriated to carry out the provisions of this title and for no other purpose such sums as may be necessary for the 8 fiscal years beginning with fiscal year 1995 and ending with fiscal year 2002.".

SEC. 4. EFFECTIVE DATE.

This Act shall become effective on October 1, 1994.

○

Mr. BRYANT. We appreciate the presence today of all our witnesses and look forward to their testimony. At this time, I would yield to the gentleman from Minnesota, if he has an opening statement.

Mr. RAMSTAD. Thank you, Mr. Chairman. We are anxious to hear from the witnesses today and would just like to welcome them and thank you for yielding.

Mr. BRYANT. Well, when Mr. Gekas arrives, if he wishes to make a statement, we will stop and allow him to do so.

I would like to thank the witnesses for being here. We will first introduce them. Stephen J. Potts, the Director of the Office of Government Ethics, accompanied by Gary Davis, General Counsel. We appreciate your being here and waiting for us to get started. I would invite you to go ahead and testify.

STATEMENT OF STEPHEN J. POTTS, DIRECTOR, OFFICE OF GOVERNMENT ETHICS, ACCOMPANIED BY GARY DAVIS, GENERAL COUNSEL

Mr. POTTS. Thank you, Mr. Chairman, and Mr. Ramstad. Thank you for the opportunity to appear today to present the administration's request for reauthorization of the Office of Government Ethics for a period of 8 years and to provide for gift acceptance authority for the Office.

In 1988, OGE was reauthorized for 6 years through fiscal year 1994, so that would end October 1 of this year. The purpose for this term was to avoid having a reauthorization falling within an election season or during the first year of a Presidential term when very substantial resources of OGE are devoted to the nominee clearance process.

Now, the bill that is pending, H.R. 2289, provides for reauthorization of OGE for a period of 8 years through fiscal year 2002. This 8-year period avoids both a presidential election year and the first year of a presidential term.

Another benefit of an 8-year reauthorization is the savings of staff time and resources that would be expended for reauthorization if we came up in some shorter period of time.

An additional provision of the legislation is the authorization of gift acceptance authority for OGE within certain restrictions and requirements. The director may accept on behalf of the U.S. contributions of money, use of facilities, personal property, and services to further the mission and programs of OGE. This proposed gift acceptance authority would be used primarily to support OGE's education and training program.

In carrying out its training mission, OGE provides ethics training at locations both in Washington and also in regional locations throughout the United States. Sometimes we find that Government facilities are inadequate in terms of size or equipment resources to support our training efforts, particularly when we are operating in the regions. In some cases, we have had situations where State or private or local government facilities might be better suited to our needs or in fact might be the only thing available to us at the time that we schedule the training.

This gift acceptance authority would enable OGE to accept the use of these facilities and the services of technical and other personnel, such as projectionists and custodians, if offered by someone other than a Federal agency. Equipment and material could be accepted under this authority.

Now, language in the bill precludes acceptance of any gift that would attach conditions inconsistent with law or regulation or would require the expenditure of funds not available to OGE. In addition, as a protection, the director of OGE is required to issue rules establishing criteria governing gift acceptance to assure that any gift will not compromise the integrity of the agency's programs or create any unfavorable appearances.

OGE will take appropriate steps to ensure that the acceptance of any gifts will be carefully controlled and will be scrutinized for any real or apparent conflicts with the mission of the office or the duties of any individual employees.

Now, in the rest of my remarks, I will focus on two aspects of OGE's responsibilities. First, the Presidential transition, and secondly, part of our program, which is ethics program reviews that we conduct of the ethics programs of the various departments and agencies of the executive branch. Then, I would like to close with just a glimpse at what we see is the future of the ethics program.

First, presidential transition. A Presidential transition year presents special responsibilities for OGE. Prior to an election, OGE briefs candidates' staffs on the ethics laws covering high-level appointees and how OGE works with new appointees and the White House Presidential Personnel Office in the appointment process.

More particularly, the financial disclosure statement of individuals nominated by the President for positions requiring confirmation by the Senate are reviewed—first by the White House Counsel's Office, then the agencies where they are going, and then OGE—prior to the nominee's confirmation hearings.

Prior to the confirmation hearings in the Senate, the personal finances of individuals nominated are thoroughly analyzed. Problem areas are discussed with them and appropriate remedial steps are fashioned in order to avoid conflicts between the nominee's financial interests and their prospective government positions.

At the end of 1992, OGE again geared up for a Presidential transition. This time, however, the process required more resources than in the past. Not only did the new incoming administration need assistance with the nominee disclosure and conflict of interest review process, but because this transition involved a change of political party, there was a substantial increase in the need for information on negotiating for employment and for guidance on post-employment rules for the members of the previous administration. So we were giving a lot of advice to the people that were going out into the private sector.

Now, I see the red light has come on.

Mr. BRYANT. Keep on going.

Mr. POTTS. I just have a few more comments.

Let me turn to the ethics program review. At a Senate oversight hearing in 1990, OGE was urged to be more assertive in gaining compliance from agencies on recommendations made in our program reviews. The problem was that OGE lacked the personnel to

conduct the reviews as was noted in a GAO review of OGE's agency oversight role.

Now, with the support of the administration and the Congress, OGE received the financial and personnel resources that we needed. Resource increases were primarily applied to strengthening the program review function and the desk officer system.

We have management analysts in the Office of Program Assistance and Review and they monitor executive branch agency ethics programs and an employee compliance with ethics laws and regulations through these periodic ethics program reviews. Ethics specialists who serve as desk officers assist agencies in the development, maintenance, and improvement of the various agency ethics programs. And these desk officers often assist agencies in implementing ethics program recommendations which stem from OGE's reviews which have been conducted by our management analysts.

Through that desk officer system, which was established in 1990, we found that we can become more quickly aware of agencies with problems than we could just with doing the reviews alone on some sort of periodic schedule on about a 3- to 4-year cycle.

If these problems cannot be solved through the desk officer's intervention, we schedule a program review. Also, our staffing levels now permit us to form a 6-month followup review after each general review to ensure that our recommendations have actually been implemented. We find that these agency ethics programs have really improved dramatically since the passage of the Ethics in Government Act of 1978 with more support, staff and resources provided to the programs in most agencies.

Currently I would have to say, though, that the trend toward stronger programs may be changing due to budget cuts in the agencies. Agencies are depending on OGE far more often to help them with their problems. Some are starting to be in a position in fiscal year 1995 where they may have to pick and choose which elements of the program to operate if staff is cut any further.

During 1992 and 1993, OGE issued 80 reports to designated agency ethics officials making recommendations to strengthen ethics programs. Copies of these reports were also sent to agency heads. Now, these reports covered ethics programs in 104 departments, agencies, offices or components and 27 regional offices and military bases. This compares to 17 reports issued during the 1990–91 period. So you can see there was a great step-up in activity as a result of the additional resources that we were given.

OGE also increased followup reviews 6 months after each report to ensure that agencies implemented the report recommendations.

Now, what does the future look like for OGE? Barring any significant additional changes in the statutes and regulations administered and interpreted by OGE, in the near term, we expect to complete the final task required as a result of the changes in 1989. We see the longer term, however, as an opportunity for some studied reflection on the value and effectiveness of all the program changes which I mentioned earlier.

A basic framework of the executive branch ethics program was established in the 1960's and that program remained substantially unchanged for about 25 years. OGE and the agencies now need

time and experience working with this revised framework before its true value can be adequately judged.

Additionally, however, OGE and agencies must continue to ensure that employees are aware of the more complex statutes and standards to which they as public servants are expected to adhere. With the current trend in budget cuts throughout the executive branch, we expect that agencies will be looking for OGE for guidance and creative assistance in meeting these responsibilities with diminished resources. That, we believe, is a substantial challenge for OGE in the future.

And in closing, let me just briefly summarize OGE's current resources. Since its inception, OGE has been small by any standards. Its programs have been focused and leanly staffed. At the present time, OGE has an appropriation of $8.3 million for fiscal year 1993 and is allocated a personnel ceiling of 93. The request in the President's budget for OGE for fiscal year 1995 is for $8.1 million as compared to 8.3 for fiscal year 1994 and a personnel ceiling of 93.

Now, that concludes my statement. I am happy to respond to any questions you may have about OGE or about our programs or about the legislation which would reauthorize our Office.

[The prepared statement of Mr. Potts follows:]

STATEMENT OF

STEPHEN D. POTTS
DIRECTOR, OFFICE OF GOVERNMENT ETHICS

ON

H.R. 2289, REAUTHORIZATION OF THE OFFICE OF GOVERNMENT ETHICS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
COMMITTEE ON THE JUDICIARY

UNITED STATES HOUSE OF REPRESENTATIVES

ON

MAY 12, 1994

MR. CHAIRMAN, AND MEMBERS OF THE SUBCOMMITTEE:

Thank you for the opportunity to appear today to discuss H.R. 2289, Reauthorization of the Office of Government Ethics.

I would like to take a few minutes to provide some background on OGE and outline its responsibilities.

The Office was first established in 1979 as part of the Office of Personnel Management. It became a separate agency on October 1, 1989. The Office is responsible for providing "overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency."

To carry out this responsibility the work of OGE tends to fall into six general areas: regulatory authority, financial disclosure programs, education and training of employees, guidance and interpretation of laws and regulations, enforcement within agency ethics programs and evaluation of ethics laws. OGE is organized by program area: Office of General Counsel and Legal Policy, Office of Program Assistance and Review, and Office of Education. These units are supported by a small administrative staff who provide for personnel, budget, administrative services and information management.

The Office of General Counsel and Legal Policy is responsible for establishing and maintaining a uniform legal framework of Government ethics for executive branch employees, and for assisting agencies in its implementation. Management analysts in the Office of Program Assistance and Review monitor executive branch agency ethics programs and employee compliance with applicable ethics laws and regulations through periodic ethics program reviews. Ethics specialists, who serve as desk officers, assist agencies in the

development, maintenance, and improvement of agency ethics programs. Desk officers often assist agencies in implementing ethics program recommendations stemming from reviews conducted by the management analysts. The Office of Education assists departments and agencies in insuring that quality ethics education programs are provided to the almost five million executive branch employees and that materials are made available to facilitate these programs.

Throughout the executive branch there is a network of Designated Agency Ethics Officials (DAEOs), one in every executive department and agency. These individuals and their staffs make up the "Federal ethics community" to which OGE communicates policy and regulatory changes. These men and women are employees of the agencies and they conduct the Federal ethics program on site: giving advice and guidance on matters of conflict of interest, financial disclosure, standards of ethical conduct and post-employment restrictions; educating employees about the statutes and standards; assisting in individual employee disciplinary actions and implementing their agencies' public and confidential financial disclosure systems.

A Presidential transition year presents special responsibilities for the Office of Government Ethics. Prior to an election, OGE briefs candidates' staffs on the ethics laws covering high-level appointees and how OGE works with new appointees and the White House Presidential Personnel Office in the appointment process. More particularly, the financial disclosure statements of individuals nominated by the President for positions requiring confirmation by the Senate are reviewed by the White House Counsel's Office, agencies and OGE prior to the nominees' confirmation hearings. Prior to their confirmation hearings in the Senate, the personal finances of individuals nominated are thoroughly analyzed, problem areas are discussed with them, and appropriate remedial steps are fashioned, or agreed to, in order to avoid conflicts between the nominees' financial interests or affiliations and their prospective Government positions.

Accomplishments

The achievements of the Office of Government Ethics since the last reauthorization are significant.

The agency became separate in October 1, 1989 which required OGE to take responsibility for creating and providing the services which it had previously received from the Office of Personnel Management: financial and recordkeeping activities, personnel services, information management, drafting and issuing regulations governing agency activities.

In 1989, during the months immediately preceding OGE's becoming a separate agency, a Presidential election and transition

began. President Bush signed Executive Order 12674 directing OGE to issue new branch-wide standards of conduct replacing agency specific standards in use since the mid-1960s. In addition, later in the year the Ethics Reform Act was passed and technical amendments were passed the following May. Provisions of this Act necessitated changes to all the forms which had been issued by OGE and also required issuance of new regulations implementing changes to the criminal conflict of interest statutes and newly-enacted civil "ethics" statutes. A list of the major tasks facing OGE follows:

- •issuing new administrative standards of ethical conduct;
- •issuing new regulations and forms implementing public and confidential financial disclosure systems;
- •issuing new post-employment regulations and guidance;
- •developing procedural guidance for agency ethics programs and OGE oversight;
- •issuing regulations on agency ethics training programs;
- •developing and administering a Certificate of Divestiture program for the deferral of recognition of capital gains for assets sold to avoid actual or potential conflicts of interest;
- •drafting for the FAR Council the federal acquisition regulations' provisions pertaining to post-employment restrictions; negotiating for employment and gifts applicable to procurement personnel; and
- •drafting and issuing interpretive regulations on the criminal conflict of interest statutes.

We have accomplished every item on this list except the issuance of interpretive regulations for the criminal conflict statutes. Those three regulations are in varying stages of the drafting process. We hope the Section 208 regulations will be published this fiscal year followed by the Section 207 and finally the Section 209 regulations.

At an OGE oversight hearing in 1990, the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs, urged OGE to be more assertive in gaining compliance from agencies on recommendations made in our program reviews. The lack of necessary personnel to conduct the reviews was noted in a General Accounting Office review of OGE's agency oversight role. With the support of the Administration and the Congress, OGE received the financial and personnel resources necessary. Resource increases were primarily applied to

strengthening the program review function and the agency desk officer system.

During 1992 and 1993, OGE issued 80 reports to Designated Agency Ethics Officials making recommendations to strengthen ethics programs. Copies of these reports also were sent to agency heads. These reports covered ethics programs in 104 departments, agencies, offices or components and 27 regional offices and military bases. This compares to 17 reports issued during the 1990-1991 period. OGE also increased follow-up reviews six months after each report to ensure that agencies implemented report recommendations.

The Office of Education began to develop strategies to assist agencies in implementing ethics training including developing training materials, pamphlets and videotapes for individual agency use. It also coordinated the development of agency annual training plans to ensure that all employees are aware of their responsibilities under the various statutes and regulations which pertain to ethical behavior.

In 1991 the Office of Government Ethics hosted a conference for 200 executive branch agency ethics program staff at Virginia Beach. This was the first such meeting since 1982 and it was very well received. It brought ethics officials together to discuss common problems and concerns and to share solutions among agencies. It was also an opportunity for OGE to communicate directly with the ethics community. OGE also held conferences in 1992 and in 1993. Four hundred ethics officials attended the most recent conference, doubling the size of the two previous meetings.

At the end of 1992, OGE again geared up for a Presidential transition. This time, however, the process required more resources than in the past. Not only did the new incoming Administration need assistance with the nominee financial disclosure and conflict of interest review process, but because this transition involved a change of political party, there was a substantial increase in the need for information on negotiating for employment and for guidance on post-employment rules for the members of the previous Administration.

Resources

Since its inception the Office of Government Ethics has been small by any standards. Its programs have been necessarily focused and leanly staffed. At the present time the Office of Government Ethics has an appropriation of $8.3 million dollars for FY 94 and is allocated a personnel ceiling of 93. The request in the President's budget for OGE for FY 95 is for $8.1 million dollars and a personnel ceiling of 93.

Reauthorization of OGE

We are here today to present the Administration's request for reauthorization of the Office of Government Ethics for a period of eight years and to provide for gift acceptance authority for the Office.

The first reauthorization for OGE occurred in 1983 and was for a period of five years. In 1988, the authority necessary for OGE to become a separate agency in 1989 was part of a legislative package in which OGE was reauthorized for six years through Fiscal Year 1994. The purpose for this term was to avoid having a reauthorization fall within an election season, or during the first year of a Presidential term when substantial resources of OGE are devoted to the nominee clearance process.

The bill S. 1413 provides for reauthorization of OGE for a period of eight years, through Fiscal Year 2002. This eight year period continues the avoidance of both a Presidential election year and the first year of a Presidential term. An additional benefit of this period of time is the savings of staff time and resources that would be expended for reauthorization hearings and legislation for a shorter period of time.

An additional provision of the legislation is the authorization of gift acceptance authority for the Office of Government Ethics, within certain restrictions and requirements. The Director may accept, on behalf of the United States, contributions of money, use of facilities, personal property and services to further the mission and programs of OGE.

This proposed gift acceptance authority would be used primarily to support OGE's education and training program. In carrying out its training mission, OGE provides ethics training at locations both in Washington, DC and throughout the United States. Government facilities are sometimes not adequate in terms of size or equipment resources to support our multi-agency training efforts. In some cases, private or state or local government facilities may be better suited to our training needs. This gift acceptance authority would enable OGE to accept the use of these facilities and the services of technical and other personnel, such a projectionists and custodians, if offered by someone other than another Federal agency. Equipment and material could be accepted under this authority. Language in the bill precludes acceptance of any gift that would attach conditions inconsistent with law or regulation or would require the expenditure of funds not available to OGE. In addition, the Director of OGE is required to promulgate rules establishing criteria governing gift acceptance to assure that any gift will not compromise the integrity of the Agency's programs or create unfavorable appearances.

This concludes my statement. I will be happy to respond to any questions you may have about the Office of Government Ethics, about our programs or about the legislation reauthorizing the Office.

Mr. BRYANT. Thank you, Mr. Potts. We understand Mr. Davis does not intend to testify; is that right?

Mr. POTTS. That is correct.

Mr. BRYANT. The Chair recognizes himself for 5 minutes.

The bill before us to amend the Ethics in Government Act proposes to reauthorize the Office for 8 years as you discussed. The reasons that you provide in support of an 8-year reauthorization are that this period, and I am quoting from your testimony, continues the avoidance of both the Presidential election year and the first year of a Presidential term.

And you go on to state that an additional benefit of this period of time is savings of staff time and resources that would be expended for authorization hearings, legislation and so forth for a shorter period of time.

Eight years is a long time to reauthorize. Would you object to a 4- or 5-year reauthorization? That would lead to a 1998 or 1999 expiration time which would avoid a presidential election year and it would avoid the first year of a term.

Mr. POTTS. Well, we would strongly urge the 8 years because it seems like we would be actually cut back in terms of the length of our reauthorization. We were this last time authorized for 6 years, and the program has really been very strong in these last few years. So it seems like there is more justification for extending the time rather than cutting it back.

Mr. BRYANT. Your appropriation for fiscal year 1994 is $8.3 million with a personnel cap of 93. The budget for 1995, President Clinton requested $8.1 million and a personnel cap of 93 also. Given that over the years you have assumed more responsibilities, how is it that less funds are being requested and the number of staffers will remain the same?

Mr. POTTS. I think the main thing that has happened is that we have, as we have grown, we have gotten a little smarter about how to do things. The major expansion that occurred of the Office in terms of personnel was in the Program Assistance and Review Branch, and essentially that function was—well, I think they had three people in that function and they were very limited in what they could do.

So there was a massive staffing up, because now we have over 30 people working in that Branch. And as we were hiring new people, of course they had to be brought on and trained to really become knowledgeable about our program. We have achieved some efficiencies just from that learning curve so that we find that we can do a little more with a few less people than we could, let's say last year. I expect maybe even next year that the same thing will occur. So I think that is the main reason we would expect that.

We also, because of the buyouts, are changing our staffing patterns somewhat. Some of the older—and we hate to lose these people because they are older, very experienced members of our staff, but some of them are going to take advantage of the buyout possibility and we will have younger people that will be coming in. So that will also, in effect, save some dollars.

Mr. BRYANT. You talked about the proposed gift acceptance authority in your written statement and also in your oral presentation, and stated it would be used primarily to support OGE's education and training programs.

Do you anticipate using it for any other purpose than that?

Mr. POTTS. At the present time, we really don't. I don't—can't think of anything else that we have in mind to use it for.

Mr. BRYANT. If that is the case, should we not restrict that authority to that purpose, that is to say, for training activities?

Mr. POTTS. My understanding is that the gift acceptance authority of other agencies, and I think we did a little computation there of 60 or so agencies that have the authority—I don't believe that any of them have that kind of restriction on their gift acceptance authority. I could be wrong about that, but I am just not aware of any kind of restrictions.

And although I don't right now know of any specific purpose other than the educational purpose, I would rather have, of course, the flexibility in case something else came up, to be able to use it for that purpose. And, of course, we would, as I had indicated, intend to issue our own internal regulations which would make it clear that gifts could not be accepted if there was any question or even an appearance of impropriety in our acceptance of that kind of gift.

Mr. BRYANT. Mr. Walden is going to testify in a moment. He recommends in his statement that OGE conduct a program review of the White House and each Cabinet level department in the middle of each new administration. Does OGE have the resources to perform that kind of a review or would you have to have more personnel?

Mr. POTTS. I think it is a good idea. The only problem is trying to accomplish that all in 1 year. We are currently on about a 4-year cycle of program reviews, so every 4 years we get around to every department and agency in the executive branch.

I think the idea of scheduling the major departments, as much as we can, toward the middle of the term is a sound idea. Because after they have gotten in office and they are cranked up and running, that is definitely a good time to go in and see, if the ethics program has suffered as a result of the new people who have come in.

But we have to sort of spread it out a little bit based on our current resources. I am not sure how we would do it. If we got sufficient resources to do them all in 1 year, we would be overstaffed for the year before and the year after, and I don't think there is any great harm in spreading it out over a 2½-year period. We would try to do it sort of in the middle of the term but it is going to start early in some and a little bit late in others.

Mr. BRYANT. Very well, thank you. My time is expired.

Mr. Ramstad.

Mr. RAMSTAD. Yield to Mr. Gekas.

Mr. BRYANT. Mr. Gekas. Excuse me.

Mr. GEKAS. I thank both the Chair and Mr. Ramstad.

Mr. Potts, I am one of the people who wrote you concerning the short sell that——

Mr. POTTS. Yes, sir.

Mr. GEKAS [continuing]. Is swirling around the White House, President and Mrs. Clinton, and I was astounded in the response that you gave us as of May 3, 1994, not that it wasn't clear and very articulate, but that after reading it as a whole, it shows me that you can't investigate and you have certain compunctions and certain statutes that you have to go by, and I understand that.

Mr. POTTS. Yes, sir.

Mr. GEKAS. And then it comes out that you don't do very much with respect to—and the allegation of conflict of interest. That is just a hyperbole on my part just to get the discussion going. For instance, you say that you don't conduct investigations, and yet, you have the power to direct an agency, do you not, to take some corrective action?

Mr. POTTS. We have—it is true, there is a very limited exception where we do have some investigatory power, but it is very limited. And basically what we do, when there is an allegation that we think has sufficient merit for investigation, then we would typically refer it to the Inspector General of the agency where the employee is—where he or she works, and then we consult with the Inspector General about what we see as the area that is covered by the allegation in terms of what statutes, what regulations are implicated, give them that advice. Then they do the actual factfinding and issue a report which then is handled within the agency.

But our role is really the oversight and policymaking role and it is only in the very unusual circumstance that we, as a matter of last resort when someone doesn't take action in something that is really very obvious where they should have, that we would intervene.

And frankly, we have never had to exercise that authority because every time we have felt there was some sort of problem, we would raise it with that agency and so far they have always responded.

Mr. GEKAS. Well then, assuming that the allegations or the circumstances as raised by newspaper articles and other data that we submitted to you, assuming for the purposes of our argument that Mrs. Clinton did engage in questionable conflicts of interest type of activity. Assuming that, you would, what, send a memo to the White House to take corrective action? Is that what would happen? Assuming——

Mr. POTTS. Right, assuming there was something. Let's say it was not Mrs. Clinton, it was some employee of the White House.

Mr. GEKAS. I am assuming it was Mrs. Clinton because that is the next in my hypothetical. Assuming she is an employee for all purposes, assuming that the allegations rise to more than just rumor, and that you had solid basis to feel like as an employee, there was a question of conflict of interest, what action would you take?

Mr. POTTS. Right. First of all, let me say, as we said in our letter, that it is unsettled insofar as conflict of interest laws whether she is employed, but that is assuming that.

Mr. GEKAS. I said assuming all of that.

Mr. POTTS. Assuming that, we would contact the ethics official at the White House and refer the matter for further exploration by the ethics official, the White House being a little unusual since

they don't have the Inspector General setup. So it would go to the Counsel to the President as the designated agency ethics official for the White House.

Mr. GEKAS. Have you ever had occasion to do that since you—in your incumbency to any President of the White House?

Mr. POTTS. We have—not specifically quite that way. The one matter which is most closely analogous was the investigation that was conducted first by the White House Counsel's Office of the use of public transportation facilities by chief of staff Mr. Sununu.

Mr. GEKAS. That is Sununugate.

Mr. POTTS. Sununugate, right. When they completed their report, then they, at our request, sent it to us for our review and we made a determination that there were a few instances in which we felt, in addition to the ones where they had found, where he had abused that privilege and recommended that he be required to reimburse the Federal Government for those additional amounts, which he did pay ultimately.

Mr. GEKAS. Did you apply that same standard to Travelgate, to the travel agency brouhaha that began last year, ended last year?

Mr. POTTS. That was handled a little differently. That had gone to the Department of Justice and was being considered by the Department of Justice for any possible criminal violations, and one of our—just one of our internal rules that we apply is, we step aside when something is being criminally investigated. We will not get involved until that has been resolved.

Mr. GEKAS. And if it is resolved and there is a criminal charge brought, then a patent conflict of interest occurred, then what?

Mr. POTTS. Then the Department of Justice would prosecute.

Mr. GEKAS. I understand. You say you would step aside until such a thing came down. Would you come back into it then?

Mr. POTTS. We don't. They have—they preempt our jurisdiction at that point if they are going to prosecute criminally.

Mr. GEKAS. So I take it you also decide at the outset that if something merits a criminal investigation, you don't touch it anyway? In other words, if in that first instance, the first time you get an allegation—may I proceed for a few minutes?

Mr. BRYANT. Yes.

Mr. POTTS. We might refer it at that point. If we thought it was a clear criminal violation, it is also possible for us to refer it directly to the Department of Justice.

Mr. GEKAS. So that something brought to your attention at the start, if you feel has criminal implications, then you are out of it altogether, or right away, you refer it?

Mr. POTTS. That is right, we would refer it. We would either refer it to the Department of Justice——

Mr. GEKAS. I am trying to get to something that you do. So far everything is referred out. Let me ask you this. You state that insofar as the person of the First Lady is concerned, that even though a Federal court for the purposes of the task force situation in which the lady was involved, is involved, even though they did, for purposes of sunshine, determined that she is a Federal employee, you dismiss that as saying that that is not an interpretation out of 218; is that correct?

Mr. POTTS. The court made it very clear that they were making that decision only for purposes of the Federal Advisory Committee Act and, in fact, as you may recall, Justice Buckley concurred with the opinion but disagreed even that she was an employee for that purpose. So it was a two to one decision.

And secondly, when we are talking about a criminal statute—as a lawyer by background myself—I think when you interpret a criminal statute, you have to interpret it much more conservatively for purposes of its coverage than you do a public policy type statute.

Mr. GEKAS. Is there any kind of court decision that has determined that the First Lady is not an employee?

Mr. POTTS. No. I would say the issue is unsettled.

Mr. GEKAS. On that basis, then, you won't touch it?

Mr. POTTS. No, we went on in our analysis to say that that was a question that we had in our minds that we think is a very serious unsettled matter, but then we went on and the fundamental basis for our opinion was that the health care reform issue is not a particular matter under the statute, under section 208.

Mr. GEKAS. Yes. You are implying—again, we are going to—I am trying to find out what you do because—I know.

Mr. POTTS. I would be happy to tell you what we do.

Mr. GEKAS. I think you do a lot more than you probably do, but so far I am finding out, what you do not do. The health care bill which you have determined is not of substantial—how do you——

Mr. POTTS. Not a particular matter as defined in the—right, under section 208.

Mr. GEKAS. Implies to me that any omnibus bill, the crime bill, the health care bill, the defense budget, wherever anybody is involved in any of that particular bill, like if I had a defense contractor do a special favor for me which would be, as a legislator, beyond the pale of ethics, this being an omnibus bill like the health care bill which only has a little part of it having to do with pharmaceuticals, would not—the omnibus, the omnibusity of it, if that is a word, doesn't make it of particular interest any more.

Mr. POTTS. Well, first of all, section 208 only applies to the executive branch employees.

Mr. GEKAS. I understand.

Mr. POTTS. So if we were talking about——

Mr. GEKAS. Somebody in the White House was involved.

Mr. POTTS. In the defense omnibus bill, I think that is probably right. We are talking about something that applies to such a broad spectrum and is such a broad policy matter that it is not a particular matter. The problem that we had specifically on health care reform, which literally will affect every person in the United States, if we had said that health care reform is a particular matter, it would affect every Federal executive branch employee. There would not be one person that could act on health care reform because they would have a conflict of interest by that interpretation.

Mr. GEKAS. If what? They would have a conflict of interest if what?

Mr. POTTS. Well, they would not be able to work on health care reform as a general matter because health care reform applies to—would apply, as it is proposed, to every citizen in the United States,

and it would impact every Federal employee. Specifically the proposal would eliminate FEHB, so every Federal employee would have something to lose. They would have a conflict of interest between the President's proposal and their own pocketbook in the fact they might lose their FEHB coverage. So that conflict would preclude them from acting or advising on health care reform.

Mr. GEKAS. What I am getting at is that if every bill, omnibus bill is exempt, then we don't even begin an inquiry when there is an alleged conflict of interest when some big bill is before the Congress involving a member of the executive. We dismiss that right away, is that what you are saying?

Mr. POTTS. Well, it certainly, insofar as the criminal implications are concerned, yes.

Mr. GEKAS. What about the noncriminal implications?

Mr. POTTS. Well, I think that is a different matter. It is a matter of judgment and you are talking about, you know, just politically, the appearances of what someone might do. They are shielded from criminal prosecution.

Mr. GEKAS. You also drew the conclusion that there was no appearance of impropriety noncriminally, politically and/or conflicts of interest not criminal as to—as regards to the First Lady; is that correct?

Mr. POTTS. No, I didn't mean to imply that. My analysis was—there is, under the Code of Conduct, a question of appearance of impropriety, but again, it hinges—you first have to find you are dealing with a particular matter. So we were dealing with the criminal statute and the standards of conduct, but we weren't passing judgment about just politically what might—how things might appear.

Mr. GEKAS. You say here, it is our view that there is not even an appearance that a criminal conflict law has been violated, which, I understand, you differentiate.

Mr. POTTS. Right.

Mr. GEKAS. Are you saying that there can be—that there can be an appearance of a criminal conflict but not of a political conflict?

Mr. POTTS. Well. No, I think if there was an appearance of a criminal conflict, it almost always would be an appearance of a political conflict.

Mr. GEKAS. So the converse comes true.

Mr. POTTS. But the converse—you could certainly not have the appearance of a criminal violation, but it, to some people, politically it might have a bad appearance.

Mr. GEKAS. And if it does have the appearance of impropriety politically, that you don't even get to the criminal, do you act?

Mr. POTTS. No, we don't have any authority to act in that case.

Mr. GEKAS. I have no further questions at this time.

Mr. BRYANT. Mr. Ramstad.

Mr. RAMSTAD. Thank you, Mr. Chairman.

Mr. Potts, a lot has been written and said this last week, the last several days about legal defense funds, and I was curious as to your Office's policy concerning the status of law or ethics policy in regard to Presidential legal defense funds.

Mr. POTTS. Right. It is permissible for the President or anyone in the executive branch to have a legal defense fund. The restrictions on the President are not the same as the rest of the executive branch, however. In both instances, the payments from a legal defense fund are considered to be gifts and the contributions to the defense funds are indirect gifts to the recipient.

So the question generally is, are the gifts acceptable? With regard to the President, the President may accept gifts from any source. I mean, he is unique in that regard. He does have to disclose them, however, when they reach the $250 threshold value. Now, he is subject to the same disclosure law as are Members of Congress. Thus, the consideration of the President with regard to a legal defense fund is that of appearance.

Now, if friends outside of the Government decide to establish the fund, it would be incumbent upon the President to be sure that the fund was run in a manner that would least likely expose him to criticism because of the donors. As you all know, that is the same issue that arises from campaign contributions. There is no magic formula about how one should be set up, but common sense and an appreciation for the appearance that he might act favorably with regard to the donor should be, I believe, controlling guides.

With regard to other executive branch employees, I believe my staff provided your staff with a copy of a letter that we issued last year on this subject, and executive branch employees are covered by the standards of conduct gift rules in 18 U.S.C. 209 which is a criminal provision about prohibiting supplementation of salary. Therefore, the funds for other employees have to comport with those precepts.

Mr. RAMSTAD. Just a followup question, Mr. Chairman. Mr. Potts, this week Bruce Lindsey, Senior Adviser to the President, said that one option being considered by the White House was a legal defense fund run by outside friends whose donors were kept secret so the President didn't know who they are.

Consistent with what you just said, would that be permissible?

Mr. POTTS. It would be permissible. The thing that has to be considered there as compared to the full disclosure approach is there is nothing that would prevent a donor whose name has been kept secret, under the program, from just walking up to the President and saying, "You know, I gave you—I gave your defense fund $5,000," or whatever.

Now, the President wouldn't be able to double-check because he would be blinded as to what is there. That is the situation with it. I mean, it is——

Mr. RAMSTAD. Well, I mean, if this secrecy in such legal defense funds were an executivewide policy or a governmentwide policy, would you feel comfortable with that?

Mr. POTTS. You know, there really isn't a perfect solution on these legal defense funds because of the two ways of doing it. On the one hand, to keep the names of the donors secret has the flaw that I mentioned, that it can't prevent somebody from walking up and at least claiming that they made a contribution. It does have the advantage generally, if people adhere to the secrecy, that the ultimate recipient of the benefits of the legal defense fund does not

know who the donors are at all and so, therefore, it sort of solves the conflict problem in that respect.

On the other hand, if there is full disclosure, then the recipient does know who the donors are and then our position would be, you want to put in other protections such as perhaps limits on the amount of the donations that could be made to the legal defense fund. There might be restrictions on, you know, certain entities, whether a corporation or labor union, let's say, might be prohibited from contributing.

Mr. RAMSTAD. What is the—and I understand, believe me, the dilemma that the President finds himself in, this President finds himself at this particular time. Obviously he stands to amass enormous legal fees given the pending litigation, and is not in a position to personally pay for them, as I think would be the case for anybody on this panel. So I am sympathetic to that, but I also believe in full disclosure.

I guess I am asking, what is the policy reason for distinguishing the President for allowing certainly less than full disclosure, for allowing such secrecy, but not having this governmentwide? I mean, why does full disclosure—it seems to me, if it is good for the goose, it is good for the gander. It seems to me if full disclosure is good policy, it should apply across the board to the President also.

Mr. POTTS. Right. Well, the policy really is no different. Of course this is a case of first impression where the President is setting up—at least we understand he is considering setting up—a legal defense fund and to my knowledge, there hasn't been a decision about exactly how it will be structured. So it may very well be that the one that is going to be created is going to have full disclosure.

Mr. RAMSTAD. Thank you, Mr. Chairman.

Mr. BRYANT. Mr. Potts, about 2 years ago the OGE conducted a review of the Department of Commerce's ethics program and in its report to the General Counsel at Commerce, OGE stated that no conclusions were made with regard to Congress' implementation of travel gift acceptance from non-Federal sources under 31 U.S.C. 1353 because Commerce's ethics officials refused to allow OGE access to the travel records.

Has OGE resolved the issue of who has oversight authority of agency regulations and limitations concerning employee acceptance of travel and subsistence from non-Federal sources?

Mr. POTTS. I believe we have, Mr. Chairman. Since that problem we had with the Department of Commerce, we have reviewed the travel records of about 50 other departments and agencies and haven't had a problem. Actually as we speak, we have a review team at Commerce reviewing their Trademarks and Patents Division, and they have, this time around, provided us without complaint the travel records. So it seems like that little glitch has gone away.

Mr. BRYANT. So they have provided you with all the travel records which you were previously denied access to?

Mr. POTTS. That is correct. At least this division has. We are not doing a review of the Department of Commerce from A to Z. It is the Trademarks and Patents Office and that operation comes under the same General Counsel which has this time around not objected and has provided us the travel records.

Mr. BRYANT. Do you intend to go back and seek the things you were denied?

Mr. POTTS. We eventually got them, so we——

Mr. BRYANT. Any more questions?

Mr. GEKAS. I have none.

Mr. BRYANT. Thank you very, very much. We appreciate your being here.

Mr. POTTS. Mr. Chairman, we will stay here and I know there are other witnesses. And if there are questions that are raised in the minds of the panel by the other witnesses, we will be here if you wish to recall us to respond there.

Mr. BRYANT. Fine. Thank you very much.

At this time, the Chair would invite the second panel to come forward. John Keeney, Deputy Assistant Attorney General for the Criminal Division, Department of Justice; Llewellyn Fischer, General Counsel to the Merit Systems Protection Board; and Attorney Gregory S. Walden.

Gentlemen, we were quite liberal with time with Mr. Potts inasmuch as he is the Director of the agency we are dealing with today. We would ask each of you to limit your statements to 5 minutes and then we will ask you questions.

We will start first with Mr. Keeney.

STATEMENT OF JOHN C. KEENEY, DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE

Mr. KEENEY. Thank you, Mr. Chairman. I offer my statement, and I would like to take about 3 or 4 minutes to summarize its content.

The Office of Government Ethics maintains other relationships with components of the Department of Justice, including the Justice Management Division and the Office of Legal Counsel. My remarks are primarily from the perspective of the Criminal Division.

The overall objective of our relationship with OGE, of course, is to assure effective coordination between advisory and prosecutive components of the executive branch. In short, I believe we have a successful working relationship and, for that reason, we support the proposed reauthorization.

With respect to our enforcement efforts, OGE plays an important role. The Criminal Divisions Public Integrity Section which administers criminal enforcement of the conflicts of interest laws maintains a number of both formal and informal relationships with OGE. Generally, OGE attempts to facilitate understanding of the conflicts of interest laws and, thereby, minimize the risk of inadvertent violations. OGE complements the Criminal Division's enforcement of the conflicts statutes by developing regulations and policies concerning these laws.

When a formal advisory opinion is sought in a matter which is important and of first impression but does not involve an actual or apparent violation of the law, OGE consults with the Department of Justice's Office of Legal Counsel before issuing an opinion. Where there has been an actual or apparent violation of any of the conflicts statutes, OGE consults with the Criminal Division, and as

Mr. Potts indicated, will refrain from issuing any opinion until a prosecutive decision has been made.

Once a formal advisory opinion has been issued, a person who relies upon the opinion in good faith is not subject to prosecution under the conflicts of interest laws.

Our Public Integrity Section and OGE frequently consult informally on various matters involving statutory construction, pending legislation, the processing of cases in the criminal justice system, and other subjects of mutual concern. We jointly participate in training programs presented to agency ethics officials by OGE and maintain a close relationship with the ethics community.

In sum, Mr. Chairman, we have an effective and very satisfactory relationship with OGE and we endorse the reauthorization.

Mr. BRYANT. Thank you very much.

[The prepared statement of Mr. Keeney follows:]

Department of Justice

STATEMENT OF

JOHN C. KEENEY

DEPUTY ASSISTANT ATTORNEY GENERAL

CRIMINAL DIVISION

CONCERNING

THE OFFICE OF GOVERNMENT ETHICS

AUTHORIZATION ACT

H.R. 2289

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW

AND GOVERNMENTAL RELATIONS

COMMITTEE ON THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

ON

MAY 12, 1994

Mr. Chairman and Members of the Subcommittee, my name is John C. Keeney, and I am the Deputy Assistant Attorney General in charge of the Criminal Division of the Department of Justice. Thank you for the opportunity to appear today to discuss the reauthorization of the Office of Government Ethics (OGE). I am pleased to describe our relationship with OGE and to answer your questions.

At the outset, I note that in addition to its relationship with the Criminal Division, OGE maintains other important relationships with components of the Department of Justice, including the Justice Management Division and the Office of Legal Counsel. While I understand that they have fine working relationships with OGE, I emphasize that the focus of my remarks today is from the perspective of the Criminal Division. In short, I believe that our two agencies have a positive, fruitful working relationship that enables each of us to improve our performance. We support the proposed reauthorization.

Conflicts of interest is a wide ranging and complex area, with many layers of administrative responsibility. Given the broad sweep of federal conflicts of interest laws, it perhaps goes without saying that coordination among government offices is crucial to implement a comprehensive system designed to promote public confidence in the integrity of government officials and operations. The overall objective, of course, is to assure effective coordination between the advisory and prosecutive components of the Executive Branch.

The work of the Criminal Division in the conflicts of interest area is accomplished principally through the Division's Public Integrity Section, which handles a broad range of public corruption matters. The Public Integrity Section's role only comes into play with respect to allegations that involve criminal misconduct -- specifically, violations of the conflicts of interest statutes (sections 202 through 209 of title 18 of the United States Code) -- and related issues that may have an impact on criminal law enforcement.

OGE plays an important role in our enforcement efforts in this area. We maintain a number of both formal and informal consultation relationships with OGE.

OGE exercises oversight of the Executive Branch ethics programs. Generally, OGE attempts to facilitate understanding of the ethics laws and thereby minimize the risk of inadvertent violations. OGE also complements the Criminal Division's enforcement of the conflicts of interest statutes by developing regulations and policies concerning the ethics statutes.

Through an Executive Branch network of Designated Agency Ethics Officials, one in every executive department and agency, OGE communicates policy and regulatory changes to the federal ethics community. Ethics counsels provide counseling and may pursue appropriate administrative sanctions, when warranted, within their respective agencies. OGE also monitors the adequacy and effectiveness of federal agency ethics programs and sponsors training conferences for agency ethics personnel.

Since 1980, OGE has had a formal Memorandum of Agreement with the Department of Justice to enable OGE to render binding advisory opinions with respect to the interpretation of sections 202 through 209 of title 18 of the United States Code. Under the terms of this Memorandum of Agreement, OGE consults with the Criminal Division before rendering any advisory opinion on an actual or apparent violation of any conflicts of interest law. If a decision to undertake a criminal investigation is made, OGE will refrain from issuing any opinion until a prosecutive decision has been made. Similarly, when a formal advisory opinion is sought in a matter not involving an actual or apparent violation of the law, but which raises an important matter of first impression, OGE has agreed to consult the Department of Justice's Office of Legal Counsel before issuing any opinion. The importance of this agreement to federal prosecutors is that once a formal advisory opinion has been issued, a person who is involved in the activity in question, or in a materially identical activity, and who relies upon the advisory opinion in good faith, is not subject to prosecution under the conflicts of interest statutes.

OGE has published selected letters and formal advisory opinions through the Government Printing Office. These letters and opinions are a valuable resource to criminal investigators and prosecutors in handling conflicts of interest matters. Other documents maintained at OGE that may be of assistance to prosecutors and investigators include copies of agency opinions

written on the conflicts of interest statutes, copies of waivers issued since May 4, 1990, under section 208(b) (1) and (3) of title 18 of the United States Code (involving certain exceptions to offenses affecting a personal financial interest), and copies of the public financial disclosure forms of all Presidential appointees in the Executive Branch whose positions require Senate confirmation.

Executive Order 12674, as amended, directed OGE to issue explanatory regulations regarding sections 207, 208 and 209.[1] Those regulations must be reviewed by the Department of Justice and the Office of Personnel Management before they are published. As published, they appear in the 2600 series of Title 5 of the Code of Federal Regulations. OGE routinely discusses with the Criminal Division the impact of proposed regulations on federal criminal law enforcement. The regulations are an important source of information concerning many of the terms found throughout the conflicts of interest statutes.

The Public Integrity Section and OGE also have an important informal relationship. The Section works particularly closely with OGE's Office of General Counsel and Legal Policy to establish and maintain a uniform legal framework of Government ethics for executive branch employees,

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[1]Section 207 is entitled, "Restrictions on former officers, employees, and elected officials of the executive and legislative branches." Sections 208 and 209 are entitled, "Acts affecting a personal financial interest," and "Salary of Government officials and employees payable only by United States," respectively.

and to assist agencies in its implementation. The Section and OGE frequently consult informally on various matters such as particularly complex issues involving statutory construction, pending legislation which the Department and OGE have been asked to review, and the processing of cases in the criminal justice system. The Section informs OGE of declinations of prosecutions that arise from referrals involving the conflicts statutes, jointly participates in training programs presented to agency ethics officials by OGE, and maintains close relationships with the ethics community.

Since 1991, OGE has hosted an annual conference for executive branch agency ethics program staff. It is an opportunity for OGE to communicate directly with ethics officials, discuss common problems and concerns, and share solutions among agencies. The Public Integrity Section routinely participates in workshops and panel presentations at these conferences. Recently, the Section and OGE jointly made a presentation to the Interagency Ethics Council, a voluntarily formed group of ethics officials seeking to share insights concerning effective implementation of the ethics laws.

Another example of the complementary aspects of our work involved OGE's development of a criminal referral form for conflicts of interest cases. The statute creating OGE requires that agencies inform OGE of any matters the agencies have referred to the Department of Justice involving a conflicts of interest offense. OGE decided to develop an appropriate form

to provide a better understanding of what types of conduct seemed to be causing the most difficulty in agencies and where training efforts should be concentrated. OGE recognized our interest in this project and consulted with the Public Integrity Section in the development of the form. We worked very closely with OGE to develop the form so that in order to complete the form properly an agency official would be led through each of the elements of the crime he or she was referring to the Justice Department. If an agency official is unable to complete the form, it suggests that the matter may not yet be ripe for referral to the Department. When a copy of the form is included with a referral, the Department has a quick reference point to determine whether each element of an offense exists. Under this arrangement, OGE receives the benefits of the information for purposes of focusing its training. At the same time, we receive more useful referrals.

Mr. Chairman, that concludes my prepared remarks. I would be pleased to attempt to answer any questions that you may have.

Mr. BRYANT. Mr. Fischer.

STATEMENT OF LLEWELLYN M. FISCHER, GENERAL COUNSEL, U.S. MERIT SYSTEM PROTECTION BOARD

Mr. FISCHER. Thank you, Mr. Chairman. I will abbreviate my remarks as well in the interest of time.

I have been involved with the Executive Branch Ethics Program since 1974 when I was a staff attorney with the then-U.S. Civil Service Commission. At that point, the Commission was in charge of the entire governmentwide ethics program and I and the general counsel operated that program on a part-time basis.

Then when OGE was established in 1978, it was made part of OPM and I worked closely with the staff and leadership in drafting OGE's first regulations from 1988 to 1990. I assisted with the ethics program in the White House Counsel's Office when I was on detail from my agency. And from 1991 to 1993, I worked on the ethics program in the Office of the Vice President, again, on detail from my agency.

One of the things that has struck me over the years that I have been involved in the program is how dramatically it has grown. It has grown so much, in fact, that even in a small agency like the one where I am and serve as General Counsel, it has become burdensome.

We only have 300 employees in the agency, yet we are—26 of our employees are—required to fill out the complicated financial disclosure reports.

Even more telling is the fact that we don't have any programs, we don't administer programs that implicate a conflict of interest, so we file the statements, we review the statements, and go through the process but no one ever asks to look at them simply because they are not interested, given the nature of our program.

Another very complicated area besides the financial disclosure reports is post-employment conflicts of interest. They constitute a maze of statutory and regulatory provisions.

The governmentwide employee conduct regulations are tremendously pervasive and complex. When they were implemented, they covered 61 pages in the Federal Register. Also, there are three separate travel reporting requirements and there is an annual training requirement that all agencies must follow.

I am not saying these things to be critical of OGE and what they have done in implementing the ethics program, but it has become apparent that in this time of National Performance Review and increasing attention being devoted to scarce resources, that both OGE and the agencies are struggling to comply with some of the responsibilities under the ethics program. My hope is that the program will not be made more complicated and, I am hopeful that we can simplify it in some fashion.

I am happy to be here and to the extent that you have questions about what I have said, I would be happy to answer them.

Mr. BRYANT. Thank you very much.

[The prepared statement of Mr. Fischer follows:]

STATEMENT OF LLEWELLYN M. FISCHER

GENERAL COUNSEL

U.S. MERIT SYSTEMS PROTECTION BOARD

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear at this hearing considering the reauthorization of the Office of Government Ethics. I am the General Counsel of the Merit Systems Protection Board and its "designated agency ethics official" although my principal experience with the Office of Government Ethics has not been in that capacity.

During 1974 while I was a staff attorney in the Office of General Counsel at the U.S. Civil Service Commission, I handled ethics problems as part of my other duties. At the time, the entire governmentwide ethics program was the responsibility of the Civil Service Commission. Only the General Counsel and I devoted a small amount of our time to the program which consisted primarily of a 1965 Executive order and Commission regulations.

In 1978, the Ethics in Government Act established the Office of Government Ethics, as part of the Office of Personnel Management which was assigned many of the functions of the Civil Service Commission by the Civil Service Reform Act of 1978. As an attorney with OPM, I worked closely with some of the initial staff of the Office of Government Ethics and helped coordinate the drafting of its first regulations.

In 1989, I was asked to come to the White House to assist with its ethics program in the White House Counsel's Office. I returned to my agency after a year and then in 1991 I was asked to come to the Office of the Vice President where I assisted with its ethics program until 1993. In those capacities, I was able to observe the operations of the program from an additional and different perspective.

One of the obvious developments over the nearly 20 year period I have been associated with the Federal ethics program is its dramatic growth. What was a statement of easily understood ethical principles for all Executive Branch employees to follow with modest interpretive regulations has now become an elaborate and complex statutory, Executive order and regulatory maze. The OGE regulations implementing just the Executive order and part of the statutory scheme amount to 61 pages in the Federal Register.

The system has become too complex and difficult for many agencies to administer in several respects. My own agency, the Merit Systems Protection Board, has only 300 employees. Even more importantly, the agency hears appeals

and controversies involving Federal employees, a function that rarely implicates the types of conflicts of interest the ethics program is designed to remedy. The MSPB does not regulate the private sector, nor does it administer programs involving the substantial expenditure of funds. Yet because of the statutory requirement concerning who must file public financial disclosure reports, 26 officials of the agency must file the complicated reports even though their responsibilities do not generally implicate financial conflicts of interest. Moreover, our agency does not receive requests from outside sources to review the financial disclosure report of those filing simply because the possibility of a conflict of interest is too remote. As a consequence, the system for filing is a time consuming and futile endeavor as far as the agency is concerned. The burden of this provision could be alleviated by allowing agencies the discretion--as they have with the filing of confidential financial disclosure reports--to designate, subject to OGE approval, the employees who should be required to file because their duties implicate conflicts of interest.

The rules concerning post-employment conflicts of interest have become so complicated they are almost impossible to administer. All employees are currently barred for lifetime from representing someone in connection with certain of their activities while they were employed. There is also a two-year ban on representing someone in connection with certain matters that were within their official responsibility. There is a one-year ban on representation in connection with trade or treaty negotiations and a two-year ban for former procurement officials participating in contracts in which they were involved. There are additional one-year restrictions on contacts by "senior" and "very senior" officials with their former offices and colleagues. Those restrictions are statutory. Finally, the Clinton Administration has placed separate restrictions on the post-employment activities of its senior appointees.

Very few employees who leave government understand clearly the restrictions that apply to them simply because they are so complicated. I am still getting telephone calls from former White House employees concerning post-employment restrictions although it has been over a year since they left their employment. Some effort should be made to consolidate and simplify these restrictions.

Although I understand that the effort to provide uniform governmentwide regulations accounts for the exceptionally wide scope and intricacy of the employee conduct regulations, the scope of those regulations should be reduced. The foundation of the regulations is a 1989 Executive order which announced some general principles of

ethical conduct. Among them was that employees shall "put forth honest effort in the performance of their duties." Another principle implores employees to "protect and conserve Federal property" and not use it for unauthorized activities. Yet another principle exhorts employees to "adhere to all regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap." These simply do not seem to be subjects for regulation under commonly understood definitions of ethics. Nevertheless, except for the principle concerning observance of equal opportunity, OGE has drafted regulations implementing these principles. As to the latter, there is already an elaborate statutory and regulatory scheme for Executive Branch enforcement. The other subjects would also best be left to self regulation by the agencies themselves, particularly whether or not an employee is putting forth an honest effort in the performance of duties. Expecting OGE to regulate these matters in addition to those that fall more clearly under the subject of ethics is simply imposing too great a burden on the resources of that office.

There are now three separate and distinct authorities for payment of domestic travel expenses by outside sources. One authority that has existed for years is administered by the Office of Personnel Management. The other is administered by the General Services Administration in consultation with OGE. A third statute governing payment of travel by foreign governments is administered by the State Department. All three of these statutes are subject to separate reporting requirements. The administration and reporting of travel under these authorities should be consolidated and the reporting burden on agencies thereby reduced.

Finally, in this time of reductions in agency staff and resources under the National Performance Review recommendations, agencies are required to conduct annual ethics training no matter what size the agency or how its functions lend themselves to conflict of interest difficulties. For a small agency like the MSPB, this amounts to a significant burden. For larger cabinet-level agencies, the expenditure of staff and resources is even greater. It is clear that ethics has become a "growth industry" that has led to new layers of bureaucracy in agencies at the time they are seeking to reduce staff. Another sure sign that ethics has become a highly visible government program is the proliferation of consulting firms who now seek to assist agencies with their programs. At the same time, all agencies look to OGE for guidance and training assistance, thus stretching the capacity of that office.

I should emphasize that I have the greatest respect for the leadership and fine staff of the Office of Government Ethics. I have known and worked with some of its staff virtually since the day the Office was created. Over the years, greater and greater responsibilities have been imposed upon OGE staff by statute and Executive order. They have taken on these challenges willingly and faithfully, yet I fear that too much is expected. Aside from the difficulties of administering the subjects I have already discussed, increasingly the office is being called upon to investigate matters such as allegedly improper communications between Executive Branch officials and other questionable practices that are conveniently, but artificially, pigeonholed into OGE ethics enforcement. I think it is time to pull back and re-examine the role of OGE and consider reduced responsibilities. This occasion of its reauthorization is a good time to reflect on that possibility.

I appreciate very much the opportunity to appear before you and I would be pleased to answer any questions.

Mr. BRYANT. Mr. Walden.

STATEMENT OF GREGORY S. WALDEN, ATTORNEY

Mr. WALDEN. Thank you, Mr. Chairman.

For over 2 years, until January 19, 1993, I served as Associate Counsel to President Bush and was also alternate designated agency ethics official under Boyden Gray. In this capacity, I worked closely and regularly with personnel from the Office of Government Ethics and, based on this personal experience, I fully support H.R. 2289.

The relationship between the White House Counsel's Office and OGE was excellent. We called OGE nearly every day, sometimes more than once, concerning every aspect of ethics. Our policy was to check with OGE on any question that was particularly controversial or where the law or regulations appeared unclear. OGE's independence and its experience made its views an integral part of any White House Counsel's deliberation on a difficult or sensitive ethics question.

All ethics officials in Federal agencies want to say yes to clients who seek permission to engage in certain conduct. At the same time, however, it is agency ethics officials who have the authority and the duty to say no when ethics standards so dictate.

Of course, often standards are not clear and the question comes down to applying judgment and discretion. At such times, it is especially important and beneficial to be able to go to OGE, which has the independence and the reputation for integrity, as well as its capacity to exercise sound and fair judgment.

OGE's views provided protection for agency ethics officials, both within the agency, if the answer is "no, you can't do it" or "you shouldn't do it," as well as outside the agency if the answer is, "yes, you can do it."

In the clearance process, we worked closely with OGE and agency ethics officials. I don't recall a single instance where either the White House Counsel's clearance or the Presidential nomination was held up unreasonably because of OGE.

I also observed OGE's relationship with other Federal agencies, including the Justice Department, OMB, and OPM. They have a fine working relationship with the Public Integrity Section of the Justice Department, as well as the Department's Office of Legal Counsel. On ethics legislative proposals, obtaining OGE's views was essential. For instance, OGE resisted efforts to craft special revolving door restrictions or exemptions for particular agencies or groups of employees. Instead, it championed the causes of uniformity and balance.

On program reviews, OGE conducted a program review of the White House Counsel's Office in 1992. I found it a good and fair measure of the adequacy of our program. OGE did identify deficiencies in our financial disclosure review system and they told us of those deficiencies during the review, which enabled us to remedy those problems without delay.

I have recommended in my prepared statement that OGE conduct a program review of the White House and every Cabinet agency in the second or third year of each administration because there is the regular turnover of high-level officials and ethics officials. I

would have no objection, as recommended or suggested by the Director, to spreading that out to a 2-, 2½-year period. The principle is to allow an agency to get its feet wet, but also to do it in the middle of the term.

OGE also has authority to examine an agency ethics office's review of an employee's conduct. This is not OGE's limited authority to investigate allegations of misconduct, but it is an authority to review an agency ethics office's investigation. OGE did that in reviewing the White House Counsel's Office's review of Governor Sununu's use of military aircraft and I think it is safe to say that no individual agency ethics office has ever had the detailed, searching inquiry that OGE performed of our Office in 1992. So if there were any concern about OGE's independence from the White House or the President, I would suggest that that review should allay those concerns.

Of course it is important for any administration to resolve questions that affect its integrity, its credibility or good standing, and resorting to an investigation that is independent, at least to some degree, is preferable, has obvious advantages over an in-house review.

I also believe OGE deserves credit for struggling with and ultimately concluding the comprehensive standards of conduct for all executive branch employees. I don't think it was unreasonably delayed given the breadth and complexity of the rulemaking. A major advantage, in addition to explaining the application of the standards by way of example, was in defining a "particular matter" and "direct and predictable effect." These are murky terms. They are less murky now with the OGE standards and I hope that they will be even clearer once OGE issues its regulations to implement section 208.

Therefore, based on my personal knowledge and experience, I strongly support H.R. 2289. OGE has performed exceptionally well as a separate and independent agency within the executive branch. I agree that an 8-year authorization is appropriate for the reasons stated by the director and I also endorse the Office's gift acceptance authority. OGE would just simply be put on the same footing as other Federal agencies and I think the gift authority of those agencies has been used sparingly and appropriately. I think OGE can be trusted to do it the same way.

Finally, I wish to commend the personnel of OGE, especially its Director and its General Counsel, Gary Davis, and Jane Ley, with whom I worked regularly while in the White House. Given the broad sweep of ethics standards, the regular use of ethics as a political weapon and the dire professional and personal consequences to Federal employees who are charged with ethical misconduct, it is critical to have OGE led by persons who are sensible, who exercise good judgment, and who are sensitive to and willing to listen to different ethics viewpoints within the ethics community.

Ethics is far more complicated than simply enjoining employees to do right, and ethics officials do not do their job well simply by saying no at every chance. Ethics standards must be written clearly and enforced fairly so they are understood, respected and followed by Federal employees. The toughest standards on the books will be worth little if they cannot be followed by Federal officials.

Under Steve Potts, OGE has significantly improved the understanding of and adherence to Federal ethics standards, thereby contributing greatly to the general high integrity of the Federal workhorse force.

[The prepared statement of Mr. Walden follows:]

Prepared Statement of Gregory S. Walden

Mr. Chairman and members of the Subcommittee, my name is Gregory Walden. From December 31, 1990 until January 19, 1993, I served as an Associate Counsel to President Bush. In that position I also served as the Alternate Designated Agency Ethics Official for the White House under Counsel to the President C. Boyden Gray.

My primary responsibility was to provide ethics advice to the White House staff and to conduct the financial disclosure review of White House staff and prospective Presidential appointees to positions in the Executive Branch. Clearance by the White House Counsel's office, based largely on the financial disclosure review, was a necessary predicate to nomination by the President.

I also was called upon from time-to-time to review allegations of ethical misconduct by White House staff and certain Presidential appointees in other agencies. In addition, I performed staff work for the White House on various legislative and regulatory proposals related to Government ethics, including the comprehensive standards of conduct for Executive Branch employees contained in Part 2675 of the Code of Federal Regulations.

In all these matters, I worked regularly and closely with the officers and employees of the Office of Government Ethics. My testimony is based on this personal experience. I provide the following thoughts in support of the reauthorization of the Office of Government Ethics, and will be happy to respond to any questions from the Subcommittee.

OGE'S RELATIONSHIP WITH THE WHITE HOUSE AND OTHER AGENCIES

The relationship between OGE and the White House. The relationship between OGE and the White House Counsel's office during the Bush Administration was excellent. Throughout my two years as a White House ethics official, OGE was always available to answer questions whenever they would arise, frequently at the end of the day and sometimes over the weekend, and nearly always, it seemed, with a very short turnaround. Hardly a day went by without one or more phone conversations between the White House and OGE, concerning every aspect of ethics. Our office followed an informal policy of always checking with OGE on any question that was particularly controversial or where the law or regulations appeared unclear. Often when one OGE official did not have a ready answer to a question, another OGE official with experience with the issue would provide a response. Where a matter required a discussion with senior OGE officials such as the General Counsel or Director, their participation was also provided in a timely manner.

OGE officials provided candid advice, identifying issues and suggesting various ways in which to remedy a potential conflict

or other problem. OGE's independence, as well as its experience, made its views an integral part of any White House deliberation on a difficult or sensitive ethics question. It is the tendency of all agency ethics officials to want to find a way to say "yes" to agency clients who seek permission to engage in certain conduct. At the same time, agency ethics officials are the ones with the authority and duty to say "no" when ethics standards so dictate. Applying ethics standards often requires judgment and discretion (like when a proposed course of action, even though legal, may pose a problem of appearances). At such times, it is especially valuable to be able to obtain OGE's views, which I found to be consistently sound and fair. OGE's independence and its reputation for integrity can provide an agency with some degree of protection against criticism outside the agency (if the answer is "yes") as well as within the agency (if the answer is "no"). Because of its wealth of knowledge and experience, OGE is able often to furnish a helpful precedent.

We also made it a practice always to consult with OGE on proposed conflict-of-interest waivers under 18 U.S.C. 208(b)(1), as suggested by Executive Order 12674. In two instances -- involving the response of the United States to the Iraqi invasion of Kuwait and to the indictment of Libyan nationals for the 1988 bombing of Pan Am Flight 103 -- OGE provided valuable and timely drafting assistance on proposed waivers for several White House and Cabinet officials.

In the clearance process for prospective Presidential appointees, we worked closely with OGE officials and with agency ethics officials. Together we were able to spot all potential ethics issues and to reach an agreement on various remedial actions for the prospective appointee to consider. The rare disagreements that arose between the White House or the agency ethics official and OGE were resolved quickly and professionally. OGE provided drafting valuable and timely assistance on waiver documents and recusal statements, where those remedial actions were deemed necessary or appropriate. I do not recall a single instance in the two years I was in the White House where either the White House Counsel's clearance or the formal Presidential nomination was held up unreasonably because of OGE. Our success in spotting and remedying potential problems can be judged from the virtual absence of ethics issues arising out of the confirmation process during the Bush Administration as well as the relative small number of reports and allegations of ethics lapses by Presidential appointees.

Relationship with other Federal agencies. From my White House vantage point, I was able to observe OGE's working relationship with the Justice Department, OMB and other Federal agencies. OGE has a fine relationship with the Public Integrity Section of the Justice Department's Criminal Division; there is a continuing informal dialogue that is mutually beneficial. The

Public Integrity Section investigates and prosecutes Federal officials suspected of conduct in violation of Federal criminal ethics laws. Understanding OGE's regulations, interpretations and informal advisory letters promotes the sound exercise of prosecutorial discretion. Also, Public Integrity has alerted OGE and agency ethics officials to factors relevant to the decision to prosecute or decline and how to avoid compromising a potential criminal investigation in the course of an agency's internal review of ethics allegations.

OGE also worked closely with the Office of Legal Counsel on the uniform standards of conduct and other issues involving the construction of Federal statutory law. OGE provided OLC with its perspective and experience, although it understood that Justice is the ultimate Executive arbiter of what the ethics laws mean.

OGE also provided comments to OMB on ethics legislation proposed by an Executive agency or introduced in Congress, in addition to presenting testimony before Congress on ethics legislation. During my time in the White House Counsel's office, I found OGE's participation in such legislative matters to be essential. OGE vigorously resisted efforts to craft special revolving door restrictions or exemptions for particular agencies or groups of employees; instead, it consistently championed the causes of uniformity and balance. OGE also assisted in drafting technical amendments to the ethics laws. On occasion, OGE was the only agency to discover an ethics issue buried in a legislative proposal. A few times, OGE bravely sounded an alarm that the legislation under review would not lead to an improvement in the ethical conduct of Federal employees or foster the public's trust in government.

Relationship with Inspectors General. Often allegations of ethical misconduct by a agency official are investigated (at least initially) by the agency's Inspector General. I reviewed a small number of Inspector General reports involving ethics allegations against agency heads, because any administrative disciplinary action against such officials would have to be taken by the President. In some reports, the legal analysis of the ethics issues was simply unsatisfactory. In some, it appeared that the Inspector General had not obtained the views of an agency ethics official concerning the legal analysis of ethics standards contained in the report. I discussed my observations informally with OGE, and was later pleased to see OGE take several actions to improve the relations between agency ethics officials and Inspectors General. Inspector Generals and their staff were invited to attend OGE conferences and training and education sessions. OGE also assembled several Inspectors General and Justice officials together with OGE staff to discuss the relationship between Inspectors General and Justice Department prosecutors. This sort of dialogue should continue on a regular basis. Indeed, OGE should extend these discussions to

include agency ethics officials.

Moreover, OGE should recommend to the Inspector General community that an agency ethics official should participate in any Inspector General investigation involving allegations of ethical misconduct. Appropriate safeguards can be instituted to protect the confidentiality of the investigation. If for any reason the Inspector General believes it is inappropriate to involve the agency ethics office (for instance, where an ethics official is a subject or witness in the investigation), OGE should be consulted instead.

REVIEWING THE PERFORMANCE OF AGENCY ETHICS OFFICES

Program reviews. OGE conducts periodic reviews of agency ethics programs to determine an ethics office's effectiveness and compliance with ethics laws and regulations. OGE conducted a program review of the White House Counsel's office in 1992, during my tenure in that office.

I found OGE's program review to be a good and fair measure of the adequacy of the White House Office's ethics program. The review was done in a couple of weeks, and was not intrusive as we had feared. Other than entry and exit interviews, OGE staff conducted their review by examining documents without interruption of our regular work. Although OGE staff reviewed written ethics advice we had issued, it properly did not attempt to second-guess such advice.

When OGE discovered a few minor problems in our financial disclosure review system, which we acknowledged at the start of the review, OGE candidly discussed these problems with us while the review was going on. This was important, because the purpose of a program review is to identify areas in which improvement of an agency's ethics program is needed or appropriate. Because there will always be a lag between the conduct of the program review and the issuance of the OGE report (in our case, six months elapsed between the review and the report), prompt notice to the agency ethics office of a deficiency allows the agency to remedy the problem without delay. By the time we received the OGE report in August 1992, we had taken action to satisfy all four of the recommendations contained in the report.

Program reviews are an essential part of OGE's enforcement role and deserve the emphasis that the Director has placed on them. Given OGE's finite resources, OGE cannot conduct program reviews of every Executive agency on either an annual or biennial basis, nor should it. Program reviews for most agencies need not be done so frequently. However, I recommend that OGE conduct a program review of each Cabinet agency and the White House Office in the second year of each new Administration. In these agencies

there is likely to be a heavy turnover of high-level officials and senior ethics officers.

Review of an agency's ethics performance in a specific area. OGE also has authority to examine an agency ethics office's review of an individual employee's conduct. OGE exercised this authority in examining the White House Counsel's review of Governor Sununu's use of military aircraft. I think it safe to say that no individual agency ethics office investigation has ever been subject to the searching, detailed inquiry that OGE conducted of the White House Counsel's office in 1991 and early 1992. If there were ever any concern over OGE's independence from the White House and the President, or if any one doubted OGE's tenacity or resolve, OGE's examination of the White House Counsel's office should allay those concerns completely.

That OGE should have the authority to conduct the sort of review it conducted of our analysis of the Chief of Staff's travel is not contested. It is important for any administration to resolve questions that may affect its integrity, credibility or good standing. Resorting to an examination that is (at least to some degree) independent has obvious advantages over an in-house review in resolving such questions. An OGE review also provides a check on how an agency ethics office construes the ethics laws and standards of conduct.

REGULATIONS AND INTERPRETATIONS

The comprehensive standards of conduct for Executive Branch employees. President Bush, in Executive Order 12674, charged OGE with promulgating "a single, comprehensive, and clear" set of uniform standards of conduct for all Executive Branch employees. OGE's rulemaking, which was not completed until August 1992, was by far its most ambitious, requiring it to establish one set of standards to replace the over one hundred separate sets of ethics rules. The enormous magnitude of the endeavor was not fully recognized until OGE began receiving input from Federal agencies before proposing a rule, and subsequently from the public after it published a proposed rule in July 1991. OGE deserves a great deal of credit for concluding the rulemaking, as well as for the content of the final rule.

Although a final rule was not published until more than three years after President Bush's Executive Order, I do not believe the standards were unreasonably delayed. OGE worked tirelessly the Department of Justice, the White House and other concerned Federal agencies such as OPM to ensure that the final rule contained standards that were on the whole, "objective, reasonable, and enforceable," as directed by Executive Order 12674.

A few aspects of the standards of conduct deserve comment. First, OGE deserves credit for defining certain statutory terms and explaining the construction of individual standards by providing concrete examples in the rule itself. Two such definitions -- what constitutes a "particular matter" and a "direct and predictable effect" under the central conflict-of-interest statute, 18 U.S.C. 208 -- remain difficult to apply at the margins, but OGE's definitions (worked out with the Justice Department's Office of Legal Counsel) provide a measure of much-needed clarity to what was previously a very murky area. Further clarity should result when OGE issues rules specifically interpreting section 208. The many examples contained in the rule help to ensure that the standards of conduct are applied consistently throughout the Executive Branch, and also serve to confirm their reasonableness.

Second, OGE, faced with several hundred comments critical of a proposed standard concerning participation in professional associations (proposed section 2635.806), decided to drop the matter in the final rule. OGE announced that it expected to publish a new proposed rule on the subject "at a later date", but has not done so. Although the subject is difficult and contentious, and some argue is not a subject within the province of OGE, another attempt should be made to address this subject. OGE appropriately recognized that many questions concerning the participation of Federal employees as members and officials of outside associations should be left to individual agencies to determine as a matter of appropriations law or management discretion. Yet, ethical concerns do arise in such settings, too. It is incumbent on OGE to assist agency ethics officials in spotting and resolving these concerns. As an alternative to a set of rules, OGE should consider proposing a set of considerations that could guide agency officials in determining whether to authorize participation in the internal, business affairs of non-governmental organizations.

Third, Subpart E of the standards of conduct (section 2635.502) addresses appearance concerns that may arise from personal and business relationships that are not also financial interests within the ambit of 18 U.S.C. 208 (or section 2635.402). I applaud OGE for attempting to put some flesh on the rather amorphous concept of an appearance of a loss of impartiality, because appearance questions arise frequently in non-pecuniary contexts. When certain facts suggest the potential for preferential treatment, the explanation that there is no conflict of interest because the employee does not have a financial interest in the matter is not generally accepted by the Congress, media or the public. However, as written, section 2635.502 may be too narrow and cumbersome. OGE should survey agency ethics officials as to their experience with this section and be prepared to revise the standard if justified by the comments.

Fourth, the standards of conduct permit agencies to issue supplemental regulations, with the approval of OGE, to address ethics matters unique to an agency's programs or workforce or required by statute. While a Member of the Interstate Commerce Commission last year, I worked on the ICC's supplemental regulation -- one of the first to be approved by OGE -- which was required because of certain provisions in the Interstate Commerce Act. Other than specific statutory provisions, there are few situations that are really unique to an Executive agency *and* not addressed satisfactorily by the uniform standards of conduct. OGE should continue to resist any effort to promulgate agency-specific ethics regulations that are not strictly necessary.

Financial disclosure regulations. I also worked with OGE in promulgating regulations to implement a confidential financial disclosure system and to amend the financial disclosure requirements for public reports. These regulations are for the most part clear and straightforward, and I found them generally easy to apply in conducting a system of financial disclosure review of White House officials and prospective Presidential nominees. In parts, they appear hypertechnical, petty, or to bear only an attenuated relation to the identification of possible conflicts of interest, which should be the main if not sole purpose of financial disclosure. But the regulations merely implement very technical statutory language in the Ethics in Government Act of 1978 and subsequent amendments. I tend to agree with those who believe the financial disclosure requirements can be made less burdensome and detailed without sacrifice to the purpose of financial disclosure, but this would require legislation.

Informal opinions and interpretations. Even after the publication of the comprehensive standards of conduct and the concomitant examples interpreting those standards, there will inevitably arise many questions of interpretation and construction of the ethics laws and regulations. Historically, OGE's General Counsel's office and OGE desk officers have responded orally to most questions from agency ethics officials and Federal employees. On occasion, however, OGE has issued informal advisory letters and, much less frequently, formal opinions. The informal advisory letters and formal opinions issued from the inception of OGE in 1978 through 1988 are compiled in an indexed volume that is a critical research tool for agency ethics officials. OGE has published loose-leaf supplements containing the informal advisory letters issued in 1989-92. Further, OGE has instituted an electronic bulletin board that enables agency ethics officials to locate recent OGE informal opinions, and DAEOgrams are occasionally sent out to ethics officials addressing recent developments. OGE deserves credit for greatly improving agency ethics officials' access to current OGE interpretations and other ethics developments. As a further improvement, OGE should publish compilations of informal

opinions annually and should shorten to one year the time between issuance and publication.

Ethics conferences. I attended and participated in each of the last three annual conferences on ethics sponsored by OGE. These conferences, which bring together ethics officials from the entire Executive Branch for a series of speeches and workshops over several days, are worthwhile for the Federal ethics community. I found the subjects that were discussed topical and the discussions lively for the most part. Bringing all the ethics officials together in one place every now and then is valuable by itself. But the sheer size of OGE's annual conference makes it difficult to delve into any discrete issue with the depth it may deserve. Therefore OGE should consider convening smaller conferences on perhaps a quarterly or ad hoc basis to study a single particular issue and prepare a report for the entire ethics community.

CONCLUSION

Based on my personal knowledge and experience working with the Office of Government Ethics, I strongly support H.R. 2289. OGE has performed exceptionally well as a separate and independent agency within the Executive Branch. OGE has all the statutory tools needed to do its job well; no structural changes are needed. I agree with OGE that an eight-year authorization is appropriate, for the reasons stated in the Director's letter to the Speaker dated April 23, 1993.

I also endorse giving OGE gift acceptance authority. Most Federal agencies now have statutory gift acceptance authority; H.R. 2289 would simply put OGE on the same footing with other Executive Branch agencies, including the same protections to prevent abuse that are contained in other gift authority statutes or in agency regulations implementing such authority. It was my experience during the Bush Administration that most agencies used their gift authority sparingly and with due regard for appearance questions. Certainly, OGE can be trusted to exercise its gift acceptance authority in an equally ethical manner.

Finally, I wish to commend the personnel of the Office of Government Ethics, especially its Director, Steve Potts, and its senior leadership. Given the broad sweep of many Federal ethics laws, the regular use (and abuse) of ethics as a political weapon, and the dire professional and personal consequences to a Federal official who is charged with unethical conduct, it is critical to have OGE led by persons who are sensible, who exercise good judgment, and who are sensitive to and willing to listen to different viewpoints and perspectives within the ethics community. Government ethics is far more complicated than simply enjoining employees to "do right"; ethics officials do not do

their job well by simply saying "no" at every chance. Government ethics standards should engender and maintain the public's trust in the integrity (if not the efficacy) of Government. But ethics standards must also be written clearly, interpreted reasonably, and enforced fairly so that they are understood, respected and followed by Federal employees. The toughest ethical standards on the books will be worth little if they cannot or will not be followed by Federal officials. Under Steve Potts, OGE has significantly improved the understanding of and adherence to ethics standards by Federal employees, thereby contributing greatly to the generally high integrity of the Federal workforce.

Mr. BRYANT. The Chair recognizes himself for 5 minutes.

Mr. Keeney, you testified that the Department of Justice's relationship with OGE was a fruitful, working relationship. Are you satisfied that we don't need to do anything further to enhance that relationship?

Mr. KEENEY. I have no suggestions with respect to that. The relationship is first rate as far as I am concerned, Mr. Chairman.

Mr. BRYANT. Very well. Mr. Fischer, the main point of your written statement seems to me that most areas of ethics would best be left to self-regulation by the agencies themselves based on broad statements of policy, rather than an involved series of regulations. Is it possible that the current approach saves time by anticipating potential ethical problems and providing agency ethics officers guidance for their resolutions?

Mr. FISCHER. Well, it is possible that is the result and I think that has been the result to some degree. The difficulty has been in the mechanisms that we have to set up in the agency to administer the program as they become more complicated by statute and regulation.

Mr. BRYANT. You also argue that the scope of the government-wide standards of conduct should be reduced. For example, you state that provisions requiring employees to protect and conserve Federal property and not use such property for unauthorized purposes and to adhere to laws and regulations that protect equal opportunity are not subjects that should be addressed as ethics issues.

Who better than OGE should address these issues on an agency-by-agency basis?

Mr. FISCHER. Well, my objection to that wasn't that OGE did something about it when it was made part of an Executive order, but that it was in the Executive order in the first place. These are matters that are covered elsewhere.

We have a substantial statutory and regulatory framework for equal employment opportunity. We have individual disciplinary provisions in agencies to deal with misuse of government property. My only point was that these don't seem like matters that traditionally fall within the sphere of ethics, and that to the extent that OGE is given responsibility for policing them, it becomes more and more burdensome and imposes greater responsibilities on the Office when their resources are already stretched.

Mr. BRYANT. Mr. Walden, in your written testimony, you stated while employed with the White House Counsel's Office, you checked with OGE on, I am quoting you here, "on any question that was particularly controversial or where the law or regulations appeared unclear."

In those instances, did OGE provide oral advice or was written opinion requested?

Mr. WALDEN. Nearly always it was oral advice. We often needed answers often quickly and we did not make requests for either informal advisory letters or formal opinions when I was there.

Mr. BRYANT. Would it be better to have these opinions published, not the specific ones you asked about, but I mean in general, that kind of opinion that is requested, would it be better to publish those?

Mr. WALDEN. For questions that are either recurring or are novel, I believe any OGE response to them could be incorporated by OGE in a memorandum it sent to designated agency ethics officials. I am not sure it needs to be recorded in any other formal way, but it would be advantageous to have it written down for the use of future White House offices as well as other agencies.

Mr. BRYANT. You stated also that you tend to agree with those who believe the financial disclosure requirements can be made less burdensome and detailed without sacrifice to the purpose of financial disclosure. I wonder how they can be made less burdensome while still providing useful information.

Mr. WALDEN. I will give you two examples, Mr. Chairman. I believe that extensive categories of reporting of income is excessive. In the confidential financial disclosure form, it is only necessary for an employee to report to those interests that the employee has and the sources of income over the last year, not the amount of the asset or the amount of the income.

I think with high-level officials, it is important as to whether they have $100 of stock or $100,000 worth of stock, but there are something like six categories right now and those could be collapsed into one or two.

Similarly, the extensive transaction reporting requirements, I think, are not directly related to ethics problems. If an employee discloses on his form every asset held within the last year, whether or not it was sold and bought in the same period, that should be sufficient. We wouldn't need to explain when it was bought, when it was sold. Those questions may go to securities laws, but they do not go directly to ethics laws in my opinion.

Mr. BRYANT. Very well. My time is expired.

Mr. Gekas.

Mr. GEKAS. I thank the Chair.

Mr. Keeney, do you concur with Mr. Potts' interpretation of a particular interest as——

Mr. KEENEY. Particular matter?

Mr. GEKAS. Particular matter, yes.

Mr. KEENEY. Yes, generally. That is a very difficult area, as he pointed out. In the example that you are referring to, the health bill as such, I would agree is not a particular matter, but it is conceivable that somewhere buried in there, there might be a particular provision that might be of significant benefit to a particular person who was involved in the decisional process. So I think that if we had that situation, we would give it a close look to see if it were a particular matter.

Mr. GEKAS. How do you get that situation to take a good look at it? How does it get to you? The OGE has decided not to refer it to you, even though, under your explanation, there is a possibility.

Mr. KEENEY. I don't know that he said that. At least I didn't understand it that way, Mr. Gekas. I thought he was talking in general terms with respect to the broad sweep of the legislation. And how do we get it? Even if OGE didn't send it to us, it is the type of thing that gets raised in newspaper discussions and by Members of Congress and would come to our attention and we could take a look at it.

Mr. GEKAS. Yes. Because in reading 208 just blandly here, it seems to put the compunction on the Federal employee which says who participates personally and substantially as a government official or employee.

Mr. KEENEY. Yes.

Mr. GEKAS. Then goes on to say what other kinds of things, and then at the end, almost as an afterthought it says, or other particular matter. In other words, to me, that means that a person could be participating personally and substantially as a government official in something like the health care policy, because we are talking about that in particular, but failing that, if he isn't doing it substantially or encompassed in the work, if there is a particular matter in which there is conflict, then it also applies. That is how I read that.

Mr. KEENEY. I read it substantial participation and particular matter, Mr. Gekas.

Mr. GEKAS. And. It says or, but—well then, we will leave it to another forum, perhaps between your Office and ours, to determine how that should be interpreted.

Mr. KEENEY. Mr. Gekas, if my interpretation isn't consistent with our specialists in that area, we will send you a note on the subject, OK?

Mr. GEKAS. Very good. That is all I have.

Mr. BRYANT. Mr. Keeney, if a person believes that there is a violation of a law taking place in this area, or for that matter in any area within the whole Criminal Division, how can they bring that to the attention of the Justice Department?

Mr. KEENEY. In any variety of ways. They can write to us. They can write to a Member of Congress who will write to us about it. They can go to newspaper people who will write about it. If there are indicia of reliability about the allegations, we will take a look. In other words, if there are indicia of reliability with respect to an allegation from almost any source, we will explore it.

Mr. BRYANT. But an American citizen can walk in the door of the Justice Department and present you with a complaint if they choose to do so, which you can then examine and prosecute if you find it to be meritorious; isn't that correct?

Mr. KEENEY. Yes, and that is done.

Mr. BRYANT. I guess I am working around it trying to make the point that it is not necessary to go through the Office of Government Ethics in order to bring an allegation of wrongdoing on the part of a high-level official to the attention of the Justice Department?

Mr. KEENEY. No, sir, it is not. They do bring matters to our attention, but we get such matters from other sources too, a variety of sources.

Mr. BRYANT. Mr. Walden, thank you for your service under President Bush and Mr. Fischer, Mr. Keeney and Mr. Potts. Thank you very much for your ongoing public service and for your presence here today. We appreciate it very much.

With that, the hearing is adjourned.

[Whereupon, at 11:06 a.m., the subcommittee adjourned.]

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